

# Nadler's State Secret Protection Act Passes House Judiciary Committee

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WASHINGTON, D.C. &ndash; Yesterday, the House Judiciary Committee approved H.R. 984, the State Secret Protection Act of 2009 by a vote of 18-12. Introduced by Rep. Jerrold Nadler (D-NY), Chair of the Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, the bill would, for the first time, regulate the use of the State Secret Privilege. The bill prohibits a court from dismissing a lawsuit simply because the Administration claims that the very consideration of the case would compromise state secrets. It also outlines procedures for courts to consider, in secret session, and grant or refuse an Administration's demand to suppress evidence on national security grounds.

"There can be no law, no rights, and no liberty if the Executive can do anything it wants behind an impenetrable wall of secrecy," said Nadler. "If the Executive can have any case dismissed on the mere incantation of the magic phrase 'state secrets,'" continued Nadler, "then you have no remedy and no rights."

The bipartisan State Secret Protection Act would require a court to make an independent assessment of the privilege claim, and would allow evidence to be withheld only if the court finds that "public disclosure of the evidence that the government seeks to protect would be reasonably likely to cause significant harm to the national defense or diplomatic relations of the United States."

The following is the text of Rep. Nadler's statement for the markup of H.R. 984:

"Today, the Committee considers H.R. 984, the State Secret Protection Act of 2009. This bill codifies uniform standards for dealing with the government's claims of a state secrets privilege in civil litigation.

"In order for the rule of law to have any meaning, individual liberties and rights must be enforceable in our courts. There is an ancient maxim in law that there is no right without a remedy. And if the government violates your rights &ndash; if it wiretaps your phone without a warrant, if it steals your guns or your papers, if it invades and ransacks your house, if it kidnaps and tortures you, your only remedy &ndash; the only way you have to make the rights guaranteed you in the Bill of Rights, in the 2nd or 4th or 5th Amendments real &ndash; is to sue the government for damages or for an injunction to order a halt to the government's improper or illegal invasion of your rights.

"But if the Executive can have any case dismissed on the mere incantation of the magic phrase 'state secrets' without having to prove to a court that the concerns about revelation of sensitive national security information are real &ndash; and not simply an excuse to shield embarrassing or illegal acts or information &ndash; then you have no remedy &ndash; and no rights &ndash; and the Executive can get away with anything, regardless of anything the laws or the Constitution may say, and no one will ever be the wiser.

There can be no law, no rights, and no liberty if the Executive can do anything it wants behind an impenetrable wall of secrecy.

"The state secrets doctrine, as it has been reinvented in the last few years, is the greatest threat to liberty in this country. It must be limited and controlled, and the appropriate balance between our three branches of government must be restored. That is what this bill will do.

"Separation-of-powers concerns are at their highest with regard to secret executive branch conduct, and the government cannot be allowed to hide behind unexamined claims of secrecy.

“President Obama has acknowledged that the state secret privileged is ‘over-used’ and needs reform. In late September, Attorney General Holder issued new policies and procedures for invoking the privilege. That policy is a welcome step in the right direction. But it is not enough. While it sets up some internal policing of the privilege by the executive branch, it still permits the Executive to be its own judge. This policy does not provide for judicial review of assertions of the state secrets privilege. Congress must do so.

“Congress has already provided guidance to the courts for handling sensitive information in other contexts through FOIA, CIPA (the Classified Information Procedures Act) and FISA. It is high-time that we provided similar guidance for handling claims of secrecy in civil cases.

“Several of the witnesses who submitted testimony to the Subcommittee on Constitution, Civil Rights, and Civil Liberties – including federal judges, the former directors of the FBI and the CIA, and our former colleague Congressman Asa Hutchinson – argued persuasively that the courts have proven themselves fully competent to safeguard sensitive information, and that it is the courts – not the executive branch – that are best qualified to balance the risks of disclosing evidence with the interests of justice.

“This bill has been studied extensively by the Constitution Subcommittee, whose members reported the bill favorably by voice vote, with an amendment to clarify the right of interlocutory appeal contained in Section 8. That amendment replaced over-broad language that would have allowed immediate appeal of ‘any’ order by any party, and made clear that only the government has the right to the emergency appeal of orders that risk disclosure of information that the government seeks to protect.

“H.R. 984, as amended in the Subcommittee, and along with some additional clarifying changes that I will offer today, provides much-needed guidance to courts when handling state secret privilege claims in the following key ways:

“First, H.R. 984 prohibits dismissal of a case at the very outset on the government’s unsupported assertion that the case cannot be considered because its entire ‘subject matter’ is a state secret. H.R. 984 would require a court to examine and rule on actual – not hypothetical – claims of harm that would be caused by disclosure of the particular information that the government seeks to withhold.

“Second, H.R. 984 requires that all judges, using secure proceedings and other safeguards, review the information that the government seeks to withhold to determine whether the harm identified by the government is likely to occur. Currently, each individual judge must decide whether to review the information at issue or, instead, to accept the government’s assertions as dispositive. This has resulted in inconsistent and unfair results.

“Third, if the judge determines that the privilege has been validly asserted, H.R. 984 requires that judges prohibit harmful disclosure of that information and consider whether a non-privileged substitute can be created, allowing cases to go forward whenever possible while protecting valid state secrets.

“Where there is no possible substitute, H.R. 984 allows the judge to issue appropriate orders, including dismissing a claim or finding for or against a party on a factual or legal issue. This provision is modeled on the ‘interests of justice’ language contained in CIPA and provides judges the same type of flexibility in civil cases as they have in criminal cases.

“We all understand the need to protect national security, but both individual justice and national security can and

must be protected. H.R. 984 ensures that — when the government raises the state secret privilege in civil litigation — the correct balance is struck. I urge all of the Members of the Committee to support the bill.”